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No. 89-245

In the Supreme Court of the United States

OCTOBER TERM, 1989

ANTONIO JAVIER GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated petitioner's rights under the Confrontation Clause of the Sixth Amendment by prohibiting defense counsel from cross-examining two government witnesses regarding the results of polygraph examinations they had taken.

2. Whether the district court had the authority under former 18 U.S.C. 4205 (1982) to sentence petitioner, who was convicted of distributing more than 150 kilograms of cocaine, to an 18-year minimum term of imprisonment.

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OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 2a-8a) is unpublished, but the decision is noted at 875 F.2d 316 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1989. A petition for rehearing was denied on June 13, 1989 (Pet. App. 1a). The petition for a writ of certiorari was filed on August 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted

on one count of conspiracy to possess and to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 846, and on three substantive counts of possession and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A). He was sentenced to 60 years' imprisonment on the conspiracy count to be followed by 20 years' imprisonment on one substantive count, and to concurrent 20-year prison terms on each of the remaining counts. Pursuant to 18 U.S.C. 4205(b), the district court specified that petitioner would not be eligible for parole for 18 years. Petitioner was also sentenced to concurrent lifetime special parole terms on the three substantive counts, and he was ordered to pay a $4,000,000 fine on the conspiracy count. C.A. App. 7-11.

1. The evidence at trial showed that between 1983 and 1987 petitioner supplied more than 150 kilograms of cocaine to Miguel Valdes of Miami. C.A. App. 168-169, 456, 528, 530-531, 562, 570; see also *id.* at 793. Valdes distributed the cocaine. He paid Gerald Weathersbee and Richard Brittingham to transport the cocaine to its ultimate destination. C.A. App. 179-180, 568-569.

In 1986, Weathersbee was arrested by the FBI in Augusta, Georgia, in possession of four kilograms of cocaine. C.A. App. 477-480. He was given a polygraph examination by the FBI in 1987 regarding information that he had supplied about the illegal organization. Among other things, he affirmed that he was just a driver for the organization, and he denied that he had withheld information regarding assets that he had received from the organization. C.A. Supp. App. 15-16. When the FBI confronted him with the examiner's conclusion that he had responded deceptively to those questions, Weathersbee admitted that he may have been more than a driver, but he denied that he was hiding assets. *Id.* at 16. He suggested that his physiological responses indicating deception may have been caused by

the fact that his wife knew about his drug activities, and he had hoped to conceal that fact. *Id.* at 17.

After the polygraph examination, Weathersbee entered into an agreement with the United States Attorney for the District of South Carolina (C.A. App. 114J-114P), where a large amount of the cocaine that petitioner supplied was distributed. He agreed to plead guilty to one count of conspiracy to possess and to distribute cocaine in exchange for the government's agreement to recommend a sentence not to exceed 12 years' imprisonment. Weathersbee also agreed to cooperate with the government. In addition, he agreed to submit to further polygraph examinations. *Id.* at 1140. The United States Attorney for the District of South Carolina regularly requires defendants to agree to submit to polygraph examinations as part of plea agreements in drug cases; he has found them useful in uncovering drug-related assets. C.A. Supp. App. 2. Weathersbee, however, was never examined pursuant to the plea agreement.

Brittingham was arrested by the FBI in Fort Mitchell, Kentucky, in 1987, after his associates distributed one kilogram of cocaine they had obtained from him. C.A. Supp. App. 7. He was given a polygraph examination by the FBI during which he supplied information about the illegal organization in which petitioner participated. The test indicated that he had given deceptive responses to a number of questions, none of which involved petitioner. Brittingham explained that while he had told the FBI about all of his narcotics transactions, he had concealed the identity of the individuals to whom he sold single ounces of cocaine, including a nephew. *Id.* at 8. The FBI subsequently conducted another polygraph examination, which also showed signs of deception. Brittingham explained that he had concealed that he had sold two ounces of cocaine to another nephew and that he had given some cocaine to his son. *Id.* at 11-12.

Like Weathersbee, Brittingham entered into a plea agreement (C.A. App. 114C-114I) with the United States Attorney for the District of South Carolina. Brittingham agreed to plead guilty to a cocaine conspiracy charge in exchange for the government's recommendation that any prison sentence be concurrent with the prison sentences that would be imposed in two pending cases. The agreement included provisions requiring Brittingham to cooperate and to submit to further polygraph examinations. *Id.* at 114E-114F, 114H. He was never examined pursuant to the agreement.[1]

2. Petitioner filed a motion in limine asking that he be permitted to cross-examine Weathersbee and Brittingham regarding the fact that their plea agreements contained requirements that they submit to polygraph examinations. He specifically asked that he be permitted to question them about having responded deceptively to the polygraph examinations that were conducted prior to the plea agreements and about the government's failure to administer polygraph examinations pursuant to the agreements. Petitioner contended that such cross-examination would call into question the credibility of the witnesses. C.A. App. 12-17, 90. Petitioner did not contend (as he now does (see Pet. 20-21)) that the polygraph provisions of the plea agreements showed that Weathersbee and Brittingham were biased.

The district court held that polygraph tests could not be mentioned during trial for any purpose. C.A. App. 90. The court stated, however, that defense counsel could ask any witness about any statement he had made during a polygraph examination as long as he did not mention the polygraph examination. *Id.* at 90-91. Defense counsel was

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[1] Brittingham also entered into a plea agreement with the United States Attorney for the Southern District of Ohio. Because that plea agreement was not entered into evidence, it is not relevant to this case.

also allowed to question witnesses about the provisions of the plea agreements other than the polygraph provisions.

At trial, both Weathersbee and Brittingham testified for the government. Defense counsel cross-examined both of them extensively, focusing on the fact that they had not mentioned petitioner in their initial interviews with the FBI. C.A. App. 488, 491-493, 505-506, 595, 598-599. Valdes also testified at length about petitioner's role as supplier of the cocaine he distributed. *Id.* at 293-298, 304-309, 317-321, 330-333. Valdes's wife and William Hunt, who arranged for much of the cocaine to be shipped to South Carolina and distributed it there, also testified about petitioner's role in the drug operation. *Id.* at 168, 175-179, 528, 530-531, 538-539, 547. In addition, the government presented telephone records showing hundreds of calls among the conspirators. *Id.* at 159. The evidence also showed that petitioner had sold Valdes a car with a secret compartment for carrying drugs. *Id.* at 310.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 2a-8a. It held that petitioner's Sixth Amendment right to confront the witnesses against him was not violated by the district court's prohibition against cross-examining Weathersbee and Brittingham concerning their polygraph examinations. *Id.* at 4a. The court relied on its decision in *United States* v. *Tedder*, 801 F.2d 1437, 1444 (4th Cir. 1986), which held that evidence of the results of a polygraph test (or the fact that such a test had been administered) is inadmissible, and on its decision in *United States* v. *Herrera*, 832 F.2d 833, 835 (4th Cir. 1987), which required that plea agreements be redacted to delete polygraph provisions before the agreements are entered into evidence. Pet. App. 4a-5a.

The court also held that the district court correctly interpreted former 18 U.S.C. 4205(b)(1) (1982) to permit the imposition of a minimum term of imprisonment of 18 years.

Section 4205(b)(1), which has been repealed, provided that a court could "designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court." Since the 18-year minimum sentence imposed on petitioner was less than one-third of petitioner's 80-year sentence, the court found the sentence to be authorized by Section 4205(b)(1). The court rejected the argument that 18 U.S.C. 4205(a) (1982) limited the minimum sentence to ten years' imprisonment. The court noted that Section 4205(a) provides for parole eligibility in ten years or less " 'except to the extent otherwise provided by law,' " and it concluded that "§ 4205(b) provides the statutory sentencing alternative contemplated by § 4205(a)." Pet. App. 7a & n.1.

ARGUMENT

1. Contrary to petitioner's primary contention (Pet. 7-21), his rights under the Confrontation Clause were not violated by the district court's decision not to allow him to raise the issue of the polygraph examinations Weathersbee and Brittingham had taken. It is well established, of course, that the right of a defendant to confront the witnesses against him includes the right to impeach their credibility through cross-examination. *Davis* v. *Alaska*, 415 U.S. 308, 315-316 (1974). It is equally well established, however, that courts retain discretion to place reasonable limits on cross-examination to prevent, among other things, confusion of the issues or the introduction of repetitive or only marginally relevant evidence. *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986). The evidence petitioner unsuccessfully sought to introduce was confusing, of marginal relevance, and repetitive.

As petitioner acknowledges, the courts have a "pronounced inhospitability" (Pet. 19) to polygraph evidence. That is because there are serious questions regarding the reliability of the results of polygraph tests. See, *e.g.*, *United States* v. *Givens*, 767 F.2d 574 (9th Cir. 1985). Accordingly, the introduction of polygraph evidence usually leads to the introduction of contradictory (and confusing) expert testimony as to the reliability of polygraph evidence in general and in the case at bar. The Fourth Circuit is among the courts that have concluded that polygraph evidence is *per se* inadmissible. *United States* v. *Tedder*, *supra*; see also *United States* v. *Murray*, 784 F.2d 188 (6th Cir. 1986); *Brown* v. *Darcy*, 783 F.2d 1389, 1394-1395 (9th Cir. 1986); *United States* v. *Masri*, 547 F.2d 932, 936 (5th Cir.), cert. denied, 434 U.S. 907 (1977). While some courts of appeals allow the introduction of polygraph evidence in some circumstances (see, *e.g.*, *United States* v. *Hall*, 805 F.2d 1410, 1416-1417 (10th Cir. 1986)), it would only be in a most unusual case that a district court in those circuits would abuse its discretion by refusing to admit such evidence. *Brown* v. *Darcy*, 783 F.2d at 1394-1395 (the court could find "no United States Court of Appeals decision which * * * concluded that the refusal to admit polygraph evidence at trial was an abuse of discretion)."[2]

The district court did not err by refusing to allow petitioner to question Weathersbee and Brittingham about their polygraph examinations. Nothing in the record suggested that either witness had lied in the course of the polygraph examinations about petitioner's involvement in the con-

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[2] The Eleventh Circuit recently held that polygraph evidence is not *per se* inadmissible, but emphasized that its decision should not "be construed to preempt or limit in any way the trial court's discretion to exclude polygraph expert testimony on other grounds." *United States* v. *Piccinonna*, No. 86-5335 (Sept. 28, 1989), slip op. 17 (en banc).

spiracy. Rather, it appears that they were trying to conceal that family members knew of their drug trafficking activities and, in some cases, participated in them. C.A. Supp. App. 8, 11-12, 15-17. Moreover, as the district court made clear (C.A. App. 90-91), petitioner was free to ask the witnesses about any of their prior statements and about their plea agreements; in fact, the witnesses were each cross-examined at length. The fact that polygraph examiners had concluded that Weathersbee and Brittingham had responded deceptively to certain questions not relating to petitioner was of only marginal relevance, if any, to petitioner's defense.

Furthermore, to the extent that the plea agreement provisions allowing the government to conduct additional polygraph tests might be considered relevant to whether the witnesses were biased, it would have been cumulative. The jury was already aware that the witnesses had received the benefits of plea bargains that resulted in a reduction in the number of charges and an agreement to cap the witnesses' sentences, that the witnesses had agreed to testify as part of the agreements, and that they could be prosecuted for perjury. Nothing further would be gained by allowing the defense to show that the government could force Weathersbee and Brittingham to submit to additional polygraph examinations. Indeed, if the government had sought to introduce the polygraph provisions, the district court presumably would have refused to admit them on the ground that they constituted improper bolstering of the witnesses' testimony. See Pet. App. 4a-5a.[3]

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[3] There is no basis for petitioner's suggestion (Pet. 8) that the fact that Weathersbee and Brittingham had given deceptive answers during previous polygraph tests gave the government some special power over them. It is important to keep in mind that they had not given deceptive answers during a polygraph examination conducted pursuant to the agreements at issue. Nor had they given deceptive answers with respect to petitioner. Finally, the witnesses presumably could protect themselves

Review is not warranted to resolve a conflict between the decision here and the First Circuit's decision in *United States* v. *Lynn*, 856 F.2d 430 (1988), which petitioner describes as "the only reported federal decision to directly confront and decide this issue." Pet. 17. In *Lynn*, the court stressed that the district court's refusal to allow cross-examination concerning a polygraph provision in a plea agreement, "seen in the context of appellant's other claimed procedural flaws, had a compounded and unquestionably prejudicial effect." 856 F.2d at 434. Here, in contrast, there is no other claim of procedural error and, as we have shown, petitioner was not prejudiced. Moreover, the district court in *Lynn* allowed the government to introduce the entire plea agreement into evidence, including the polygraph provisions, and the witness stated that he " 'had to pass a polygraph test' " before the court cut off the questioning. *Id.* at 432. The court of appeals stated that it could not "ignore the government's tactic of drafting the plea agreement with the polygraph requirement clause, revealing the entire agreement to the jury (and thereby implying the witness' motivation to tell the truth), then objecting to defense attempts to expose the full implications of the clause." *Id.* at 433. In this case, the plea agreements were not entered into evidence and neither Weathersbee nor Brittingham suggested in his testimony that he had passed a polygraph test. In *Lynn*, on the other hand, once the polygraph provisions had been admitted into evidence and the witness had stated that he had taken a polygraph test, it was unfair not to allow the defense to point out that the witness had in fact responded deceptively.

2. As petitioner states (Pet. 22-28), the courts of appeals have split over the question whether former 18 U.S.C. 4205(b) (1982) permitted a district court to provide that

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by telling the truth in any polygraph examination conducted pursuant to the plea agreements.

a convicted defendant would not be eligible for parole for a period of time up to one-third of the total sentence imposed. A number of courts have agreed with the court below. *United States* v. *Whitworth*, 856 F.2d 1268 (9th Cir. 1988), cert. denied, 109 S. Ct. 1541 (1989); *United States* v. *Berry*, 839 F.2d 1487 (11th Cir. 1988), cert. denied, 109 S. Ct. 863 (1989); *United States* v. *Gwaltney*, 790 F.2d 1378 (9th Cir. 1986), cert. denied, 479 U.S. 1104 (1987); *Rothgeb* v. *United States*, 789 F.2d 647 (8th Cir. 1986); *United States* v. *O'Driscoll*, 761 F.2d 589 (10th Cir. 1985), cert. denied, 475 U.S. 1020 (1986)). Other courts have concluded that the ten-year ceiling on the period of parole ineligibility set by former 18 U.S.C. 4205(a) (1982) applies in cases like this one. *United States* v. *Hagen*, 869 F.2d 277 (6th Cir.), cert. denied, 109 S. Ct. 3228 (1989); *United States* v. *DiPasquale*, 859 F.2d 9 (3d Cir. 1988); *United States* v. *Castonguay*, 843 F.2d 51 (1st Cir. 1988); *United States* v. *Fountain*, 840 F.2d 509 (7th Cir.), cert. denied, 109 S. Ct. 533 (1988). Nevertheless, the issue does not warrant review by this Court because it is of no continuing importance. Section 4205 was repealed effective November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. 98-473, §§ 218(a)(5), 235, 98 Stat. 2027, 2031 (1984), as amended by the Sentencing Reform Amendments Act of 1985, Pub. L. 99-217, § 4, 99 Stat. 1728 (1985). That Act prospectively abolishes parole, instituting in its place a system of determinate sentencing. As a result, for all offenses committed after November 1, 1987, the issue presented in this case cannot arise, since all such offenders will be subject to sentencing under the Sentencing Guidelines and will not be subject to parole.

Moreover, petitioner's sentence is consistent with the sentences similarly situated offenders will receive under the federal Sentencing Guidelines that apply to offenses committed after November 1, 1987. The 18-year minimum period that petitioner must serve is within the applicable

range under the guidelines for a first-time offender convicted of an offense involving 50 kilograms or more of cocaine.[4] Petitioner would undoubtedly receive a 4-level adjustment under the guidelines as an organizer or leader of criminal activity (see United States Sentencing Commission, *Guidelines Manual* § 3B1.1(a), at 3.3 (Oct. 1987)), raising the applicable sentencing range to 292-365 months' imprisonment, or 24 to 30 years. Therefore, in light of the now-applicable guideline sentences for similar conduct, it is doubtful that petitioner would fare better at the hands of the Parole Commission even if he were made technically eligible for parole consideration after ten years rather than after 18 years.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1989

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[4] For such a crime, the offense level under the Sentencing Guidelines (§ 2D1.1) is 36, petitioner's criminal history category would be I, and the applicable guideline range would be 188-235 months' imprisonment, or 15 to 19 years. See United States Sentencing Commission, *Guidelines Manual* § 2D1.1, at 2.37, 2.38; ch. 5, at 5.2 (Oct. 1987).

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